FOR ARGUMENT

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No. 78-1815

In the Supreme Court of the United States

OCTOBER TERM, 1979

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
PETITIONER

v.

SHELL OIL COMPANY AND D.A. SHALE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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We confine ourselves here to a single point argued at much length by respondents (Br. 25-39): that, in 1920, Congress "expressed its intent" to treat at least some oil shale deposits as "valuable" minerals, subject to location and patent under the old mineral laws—else it would have been pointless to exempt from the new leasing system "valid claims" in respect of oil shale lands.

1. The short answer is that Section 37 of the Mineral Leasing Act of 1920 (Pet. Br. 3-4) does *not* speak to the question whether any oil shale lands were deemed subject to location and patent under the mining laws. To be sure, oil shale is included with coal, phosphate, sodium, oil, and gas, as a mineral withdrawn from future disposition except by leasing. But the decision to reserve oil shale deposits for leasing might well be made even

though lands containing such deposits were presently subject to entry under the homestead laws, rather than location under the mineral laws. Contrary to respondents' assertion, "lands valuable for such minerals" in Section 37 of the 1920 Act is not necessarily equivalent to "valuable mineral deposits" in the old mining law. See, *e.g.*, *State of California* v. *E. O. Rodeffer*, 75 I.D. 176, 179-181 (1968). Cf. *Andrus* v. *Charlestone Stone Products Co.*, 436 U.S. 604, 610-614 (1978).

The savings clause of Section 37 of course exempted any and all then "valid claims" involving the minerals subject to the Mineral Leasing Act. In the absence of a listing in the clause itself, however, the general words we find there cannot be taken to imply that some of these "valid claims" would involve oil shale—much less that any such claim to oil shale lands would exist under the mining law, rather than the general land laws.[1] Plainly, the clause would read exactly as it does if it had been

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[1]Although respondents do not mention the provision, we note the possible relevance of Section 21 of the Mineral Leasing Act of 1920 (now 30 U.S.C. 241). The "relinquishment" clause of that section may be taken to imply that there were, in the view of the 1920 Congress, outstanding oil shale claims "under existing laws on January 1, 1919." But, again, we are not told whether the "laws" referred to are the mining laws of 1870 and 1872. We do not read this Court's decision in *Work* v. *Braffet*, 276 U.S. 560, 566 (1928), as construing the term "valid claim" in the Mineral Leasing Act as confined to claims under the mining laws. The thrust of that decision is simply that, to be preserved, the claim must be "substantial"—such "as would on compliance with the provisions of the former law ripen into ownership" (*ibid.*). But, provided the test of "substantiality" is met, the claim is equally exempted if it exists under the homestead or other non-mineral laws. See, *e.g.*, *John B. Forrester and Robert M. Magraw*, 48 I.D. 188, 190 (1921).

known to all that valid claims under the existing mineral laws could cover the other listed minerals, but not oil shale.

2. Nor does the legislative history of the Mineral Leasing Act demonstrate that Congress entertained a concluded view on the status of oil shale claims under the old law. It may be that some individual members believed there were outstanding valid claims. But all that can fairly be deduced is that Congress, as a body, agreed to leave such claims where they found them, exempt from the new prohibition on patents only if then "valid" and—in the words of Section 37—"thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery." As Senator Thomas of Colorado later explained—in language quoted by respondents (Br. 37) "it was our intention that [outstanding oil shale claims] should occupy the same position in the mining law of 1872 after the leasing act was passed that they would have occupied if no leasing act had ever been passed."

In sum, the 1920 Act cannot be invoked to validate claims that did not qualify under the old law. Whether or not shale deposits were subject to location must be decided by construing the Acts of 1870 and 1872 (Pet. Br. 2-3). Of course, the views of a later generation of legislators must be taken into account. But ambiguous expressions by one or two Members of Congress half a century later cannot override the settled rule of the old mining law that "discovery" of a "valuable mineral" requires a showing that the mineral could be extracted and profitably marketed under current economic and

technological conditions. Congress might have changed that standard when it enacted the Mineral Leasing Act of 1920. It did not.

Respectfully submitted.

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Solicitor General

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